

## DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 97-0148 CG

Charity Gaming: Civil Penalties

For The Period: May 1, 1995 Through July 12, 1996

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### ISSUES

#### **I. Charity Gaming - Qualified Entities, Licensing**

**Authority:** IC 4-32-7-4; IC-4-32-12-1

The taxpayer protests the imposition of civil penalties for purchasing charity gaming supplies from an unlicensed entity.

#### **II. Charity Gaming - Charity Gaming Licenses**

**Authority:** 45 IAC 18-2-4(a); IC-4-32-12-1

The taxpayer protests the Department's imposition of civil penalties for failure to post its charity game license.

#### **III. Charity Gaming - Participation of Operator or Worker**

**Authority:** IC 4-32-9-27; IC-4-32-12-1

The taxpayer protests the Department's imposition of civil penalties for its workers participating in charity gaming.

#### **IV. Charity Gaming - Conducting an Allowable Event**

**Authority:** 45 IAC 18-3-2(i); IC-4-32-12-1

The taxpayer protests the Department's imposition of civil penalties for failure to post signs stating that tipping of the operators or workers is not permitted.

#### **V. Charity Gaming - Financial Records and Reports; Deposit of Funds; Payment of Expenses**

**Authority:** IC 4-32-9-17; IC-4-32-12-1

The taxpayer protests the Department's imposition of civil penalties for failure to keep adequate records.

#### **VI. Charity Gaming - Remuneration Received by Operator or Worker**

**Authority:** IC 4-32-9-25; IC-4-32-12-1

The taxpayer protests the Department's imposition of civil penalties for payment of bingo operators and workers.

#### **VII. Charity Gaming - Limitation on Number of Allowable Events at Same Location**

**Authority:** IC 4-32-9-22; IC-4-32-12-1

The taxpayer protests the Department's imposition of civil penalties for allowing S to indirectly participate in the operation of an allowable event by paying wages to bingo operators and workers.

#### **VIII. Charity Gaming - Donation of Gross Charitable Gaming Receipts**

**Authority:** IC 4-32-9-16.5; IC-4-32-12-1

The taxpayer protests the imposition of IC 4-32-9-16.5.

### STATEMENT OF FACTS

The taxpayer is a qualified organization that conducts charity gaming events. The Department's investigation covered the period May 1, 1995 through July 12, 1996. The Department suspended the taxpayer's bingo license from March 15, 1997 through May 15, 1997.

Additional information will be provided as necessary.

#### **I. Charity Gaming - Qualified Entities, Licensing**

### DISCUSSION

The taxpayer protests the Department's imposition of civil penalties for purchasing charity gaming supplies from an unlicensed entity. On May 10, 1995, the taxpayer purchased their bingo facility from S Corporation (see Department's exhibit #7). The taxpayer entered into a contract for the sale of real estate at (x). The contract states on page one (1), "The Purchase shall also include...bingo equipment, tables, chairs and any other personal property located on the premises..." The department's investigation showed that Bingo equipment and charity gaming supplies were included in the purchase. The S Corp. does not possess a valid Indiana Distributor's or Manufacturer's license issued through the Charity Game Section of the Department's Compliance Division. Pursuant to IC 4-32-7-4, a qualified organization must obtain supplies, devices, pull tabs, punch boards, bingo paper, or equipment designed to be used in playing bingo from a licensed distributor or manufacturer.

In the hearing, the taxpayer's witness (one of the taxpayer's operators) testified that he knew nothing regarding the purchase of charity gaming items from S Corp. The taxpayer's witness also testified that S Corp. was also a

charitable organization under IRC § 501(c)(3). The taxpayer's witness stated that they purchase charity gaming supplies from three distributors and not S Corp. The taxpayer also stated that all the purchases that they have records for came from those three distributors.

It appears that the taxpayer is under the impression that the violation cited by the Department is for purchasing charity gaming supplies from an unlicensed entity. This however is incorrect. The taxpayer is being cited for a single purchase of supplies from S Corp. which is documented in the real estate purchase agreement between the taxpayer and S Corp. The fact that S Corp. is also a §501(c)(3) entity is irrelevant. The Indiana Code is clear that all charity gaming supplies must be purchased from a licensed distributor or manufacturer. Obviously, the distributors and manufacturers of charity gaming supplies are for profit corporations and thus cannot be not-for-profit entities. Therefore, the testimony of the taxpayer's witness is not sufficient to overcome the Department's findings. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

#### **FINDING**

The taxpayer's protest is denied.

### **II. Charity Gaming - Charity Gaming Licenses**

#### **DISCUSSION**

The taxpayer protests the Department's imposition of civil penalties for failure to post its charity game license. Pursuant to 45 IAC 18-2-4(a), a readable photocopy of a license is required to be prominently displayed at the facility where the event is being held. The original license must be available for inspection upon request.

On July 12, 1996 and July 25, 1996, inspections of the bingo facility by the Department's investigators did not show the taxpayer's license or a photocopy of the taxpayer's license being posted.

The taxpayer's only witness stated that the license in question was posted on July 12, 1996 and July 25, 1996 on the wall directly behind the counter where bingo paper supplies are purchased. The taxpayer did not produce any other witnesses, pictures of the posted license on those dates, or affidavits of operators or workers who could substantiate the taxpayer's claim. Therefore, the testimony of the taxpayer's witness is not sufficient to overcome the department's findings. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

#### **FINDING**

The taxpayer's protest is denied.

### **III. Charity Gaming - Participation of Operator or Worker**

#### **DISCUSSION**

The taxpayer protests the Department's imposition of civil penalties for its workers participating in charity gaming. Pursuant to IC 4-32-9-27, an operator or a worker may not directly or indirectly participate other than in a capacity as operator or worker, in an allowable event that the operator or worker is conducting.

On July 25, 1996, workers for the taxpayer identified only as D, L, and C were observed by a Departmental investigator playing pull tab games during a bingo event while acting in a worker capacity.

The relevant portion of the direct examination of the taxpayer's witness page 54 of the transcript is as follows:

- 10 Mr. D  
11 Q Now, there was some testimony here that there were  
12 workers who were--well, let's see, specifically D  
13 L and C--that they were receiving tips from the  
14 pull-tab operation on July 19, 1996. Were you present at  
15 that time?  
16 A Yes, sir.  
17 Q Do you know anything about that?  
18 A No, sir.  
19 Q Did you ever see any such thing take place?  
20 A No, sir.  
21 Q Would that have been your practice?  
22 A No, sir.  
23 Q Would you--would you have permitted that to take  
24 place?  
25 A Not knowingly, no, sir.

The taxpayer's own witness stated that he was present on July 19, 1996, the day of the Department's investigation. He stated that he did not see any of the alleged activity take place and that he would not have permitted these

activities knowingly. However, IC 432-9-27 does not state that the taxpayer must have knowledge of the violation only that it occurs. The workers could have played without the taxpayer's knowledge or consent. The taxpayer did not support his testimony with any other evidence. The contradiction of the Department's findings alone is not sufficient to overcome the taxpayer's burden of proof. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

#### **FINDING**

The taxpayer's protest is denied.

#### **IV. Charity Gaming - Conducting and Allowable Event**

##### **DISCUSSION**

The taxpayer protests the Department's imposition of civil penalties for failure to post signs stating that tipping of the operators or workers is not permitted. Pursuant to 45 IAC 18-3-2(i), a legible sign of adequate dimensions must be prominently posted during an event stating that the operator or workers are not allowed to accept tips.

On July 25, 1996, an inspection of the facility during a bingo event by a Department investigator did not show any "no tipping" signs posted in the bingo hall. In addition, several bingo workers were observed accepting tips from bingo players.

The taxpayer's witness testified that two "no tipping" signs were posted the day in question. One was located on the right hand side of the callers stand and the other was to the left of the counter. The taxpayer went on to state that these signs were in a position where they could be readily seen by the players. The taxpayer could provide no other evidence except the statement of its operator.

The contradiction of the Department's findings alone is not sufficient to overcome the taxpayer's burden of proof. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

#### **FINDING**

The taxpayer's protest is denied.

#### **V. Charity Gaming - Financial Records and Reports; Deposit of Funds; Payment of Expenses**

##### **DISCUSSION**

The taxpayer protests the Department's imposition of civil penalties for failure to keep adequate records. Pursuant to IC 432-9-17, a qualified organization shall maintain accurate records of all financial aspects of an allowable event. The organization must maintain a separate and segregated account for deposit of charity gaming funds.

The taxpayer maintained inaccurate records. The condition of the records did not enable reconciliation to true gross income attributable to the bingo events. The Department's investigator testified that the taxpayer's financial showed income of \$2,197,937.37 and the income reported on the Bingo sheets was \$972,767.66. The taxpayer was not able to come up with a plausible explanation regarding the difference of \$1,225,169.71 which in most businesses if not all would not be an allowable discrepancy. It is clear from these figures that the condition of the records was unsatisfactory.

#### **FINDING**

The taxpayer's protest is denied.

#### **VI. Charity Gaming - Remuneration Received by Operator or Worker**

##### **DISCUSSION**

The taxpayer protests the Department's imposition of civil penalties for payment of bingo operators and workers. Pursuant to IC 432-9-25, a licensed organization may not provide remuneration to an operator or worker for conducting or assisting in conducting an allowable event.

On July 12, 1996, the taxpayer workers and its only witness were questioned about payments to bingo operators and workers. The taxpayer stated that bingo operators and workers were not paid. Payroll journals of R were examined under subpoena by the Department. The payroll records were obtained from Paychecks, Inc. The employees of R coincided with the bingo workers and operators of the taxpayer. A R worker confirmed that the R was paying wages to the bingo workers and operators for conducting or assisting in conducting an allowable event. After being confronted with this information, the taxpayer's witness admitted to the Department's investigator that the workers and operators were being paid. The taxpayer admitted the arrangement for R to make the payments because the law prohibited the taxpayer from paying compensation to the workers and operators of a bingo event.

The taxpayer's witness testified during the hearing that they did not pay the bingo workers. Transcript page 30 the direct examination of Investigator X by the taxpayer's representative states:

- 6       A       At the--When I went to the (S), I talked  
7       with the secretary there when I was trying to figure out  
8       what these people were paid for--and (JB) is her

9 name--she told me that those were specifically Bingo  
10 workers, and that--that Mr. (M) would call and tell her  
11 how many hours they worked and so forth, and that she  
12 would call Paycheck, and report that.  
13 Q Now, when--**Since you have raised this issue, have**  
14 **they not quit the practice of payment?**  
15 A Quit the practice of payment?  
16 Q Yes.  
17 A I haven't been back in since the investigation; I  
18 couldn't comment on that.

(Emphasis added).

Not only did the Department find evidence of payments to the taxpayer's employees but the Department's investigator testified that the taxpayer's witness confessed to the fact that he was paid which he knew was contrary to the charity gaming laws of the State of Indiana, but the statement highlighted above made by taxpayer's representative is also proof that the taxpayer's employees were being paid. The taxpayer's representative stated in his questioning of the Department's investigator, "have they (R) not quit the practice of payment?". It is clear that the taxpayer's representative was trying to show that the taxpayer is currently complying with the law, however, he failed to realize that he was also commenting on the fact that the taxpayer's workers were paid in the past.

#### **FINDING**

The taxpayer's protest is denied.

### **VII. Charity Gaming - Limitation on Number of Allowable Events at Same Location**

#### **DISCUSSION**

The taxpayer protests the Department's imposition of civil penalties for allowing R to indirectly participate in the operation of an allowable event by paying wages to bingo operators and workers.

Pursuant to IC 4-32-9-22, not more than one (1) qualified organization may conduct an allowable event on the same day at the same location. R indirectly participated in the operation of an allowable event with the taxpayer by paying wages to bingo workers and operators. In Issue VI the Department found that R was paying the taxpayer's workers and operators. This is evidence sufficient to prove that R was indirectly participating in a charity gaming event in violation of IC 4-32-9-22.

#### **FINDING**

The taxpayer's protest is denied.

### **VIII. Charity Gaming - Donation of Gross Charitable Gaming Receipts**

#### **DISCUSSION**

The taxpayer protests the imposition of IC 432-9-16.5. Pursuant to IC 432-9-16.5, a Qualified organization that receives ninety percent (90%) or more of the organization's total gross receipts from any events licensed under this article is required to donate sixty percent (60%) of its gross charitable gaming receipts less prize payout to another qualified organization that is not an affiliate, a parent, or a subsidiary organization of the qualified organization.

The taxpayer argues that the section is arbitrary capricious and constitutes a taking of its property and violates due process. The taxpayer argues that the 60% rule requires the taxpayer make a payment to another similarly situated charitable organization, for which they receive no compensation, and this is in effect a confiscatory tax. The taxpayer contends that the rule does not take into account the costs of the operation. In support of its argument the taxpayer cited several cases.

The imposition of IC 4-32-9-16.5 does not constitute a tax and in no way can be construed as a tax. Gambling in the State of Indiana is illegal. The legislature has through the enactment of the charity gaming statutes carved out a niche for not-for-profit organization to raise money for charity by allowing them to gamble. The legislature made the criteria stringent and the laws narrow to allow only those entities with true philanthropic motives to participate. The first word in charity gaming is charity. All the money raised through charitable gaming is supposed to go to the charities. IC 432-9-16.5 makes sure this happens. If a not-for-profit receives ninety percent (90%) of its gross receipts from charitable gaming, which means that the not-for-profit receives almost all of its money from gambling, they are required to pay 60% of the gross income less pay-outs to another not-for-profit. The taxpayer is concerned that they are not receiving compensation. The taxpayer first is a not-for-profit organization. Second, a not-for-profit should not expect compensation for giving money to a legitimate charity. Third, the expenses of the operation cannot possibly exceed 40% of their gross revenue. According to the Charity Gaming Annual Report dated October 1, 1997, of the 2300 licensed organizations all but five were made the required distribution. Of those five four made the distribution after they were notified by the Department of the requirement. The taxpayer is the only organization that did not make a distribution as required by IC 4-32-9-16.5.

## **FINDING**

The taxpayer's protest is denied.